

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

WILLIAM D. EHRHART,  
Plaintiff

v.

Civil No. 99-229-P-C

ROBERT OLMSTED,  
Defendant

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S  
REQUEST FOR STATUTORY DAMAGES, ATTORNEYS' FEES  
AND COSTS, AND INJUNCTIVE RELIEF**

Now before the Court is Plaintiff's request for statutory damages, attorneys' fees, and costs. Plaintiff seeks \$36,000 in statutory damages for willful infringement and attorneys' fees and costs of \$10,941.89. In addition, Plaintiff seeks a permanent injunction preventing Defendant from any further infringement of his copyright in *The Awkward Silence*. The Court has previously determined that Defendant Robert Olmsted willfully infringed Plaintiff William D. Ehrhart's copyright by representing to another that he held the right to reproduce the poem "Guerilla War" which is contained in *The Awkward Silence*. On May 31, 2000, the Court held a hearing on the issue of damages. The damages, fees and costs issues having now been fully briefed, the Court will order Defendant to pay \$5,000 in statutory damages plus \$8,681.43 in reasonable attorneys' fees and costs.

### **A. Statutory Damages**

Plaintiff is entitled to statutory damages for this willful violation under 17 U.S.C. § 504(c)(1) and (2) of not less than \$500 and not more than \$100,000. Plaintiff here seeks \$36,000 in statutory damages for the willful infringement. Defendant asserts that Plaintiff should not be awarded any damages since Plaintiff benefited from having his work published.

The rationale underlying statutory damages is to sustain copyright incentives while deterring infringement. The Court has wide discretion in assessing the amount of statutory damages to award for a copyright violation. *See Douglas v. Cunningham*, 294 U.S. 207, 210, 55 S. Ct. 365, 79 L. Ed. 2d 62 (1935). Having previously found a willful violation, the Court will consider the factors relevant to determining statutory damages for such violation. Those factors include: “(i) expenses saved and profits reaped by defendant[] in connection with the infringement; (ii) revenues lost by the plaintiff[]; and (iii) whether the infringement was willful and knowing, or whether it was accidental and innocent.” *Milene Music Inc. v. Gotauco*, 551 F.Supp 1288, 1296 (D. R.I. 1982); *Boz Scaggs Music v. KND Corp.*, 491 F.Supp. 908, 914 (D. Conn. 1980). In this case, Defendant was paid only \$100 for granting another permission to reprint the poem and there was no evidence of any revenues lost by Plaintiff. With regard to the first and second factors, some courts have limited recovery to the minimum statutory amount where it is shown that the plaintiff suffered no actual damages and defendant earned little or no profit from the infringement. *See, e.g., Readers Digest Assn. Inc. v. Conservative Digest, Inc.*, 642 F. Supp. 144, 147 (D.D.C. 1986); *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 988 (E.D. Pa. 1986); *National Council of Young Israel, Inc. v. Feit Co., Inc.*, 347 F. Supp. 1293, 1299 (S.D.N.Y. 1972). However, because profits gained or to income lost are difficult to determine, and are often marginal, other courts to consider the issue do not attach significant weight to those factors. *See e.g., George Simon, Inc. v.*

*Spatz*, 492 F. Supp. 836, 838 (W.D. Wis. 1980); *Boz Scaggs Music*, 491 F. Supp. at 914.

Although the elements of profit and income lost support only a minimal award of statutory damages, the seriousness of Defendant's misconduct convinces the Court that the statutory damage award here should be more significant.

While the parties once had a publishing agreement with respect to *The Awkward Silence*, in 1985 Plaintiff commenced a civil action in Maine Superior Court to prevent Defendant's further use of the work. That lawsuit was settled in July of 1986, with Defendant agreeing to convey to Plaintiff all rights of publication to *The Awkward Silence* that he "may have had, may now have, or claim to have, whether individually, doing business as NORTHWOODS PRESS, or as President of NORTHWOODS PRESS, INC., or in any other capacity." See Ex. F to Ehrhart Affidavit. Despite this agreement, in January of 1997, Defendant, in his capacity as President of The Conservatory of American Letters, granted permission to a publisher to reprint the poem "Guerilla War."

Throughout this case, Defendant has asserted that the rights to reprint the works from *The Awkward Silence* were transferred by him from Northwoods Press, Inc. to The Conservatory of American Letters in November 1982, approximately four years before he entered into the settlement agreement. Because the settlement agreement reached in 1986 did not involve The Conservatory of American Letters, Defendant asserts that The Conservatory of American Letters did not relinquish any of its rights, including the right to reprint works from *The Awkward Silence*. Defendant has maintained in this suit that The Conservatory of American Letters – an organization that he once served as President and continues to volunteer with – owns the rights to publish *The Awkward Silence*. Defendant's Post-Trial Brief (Docket No. 30) at 9 ("The Conservatory of American Letters transferred the right to reproduce the plaintiff's words because The

Conservatory of American Letters had legally acquired those rights, and had never been asked to surrender them by anybody to anybody.”). In essence, Defendant continues to assert that he cannot be stopped, when acting on behalf of The Conservatory of American Letters, from granting others the right to reprint Plaintiff’s work.<sup>1</sup>

The award of statutory damages for the infringing conduct tends to escalate in direct proportion to the culpability of the infringer. *Milene*, 551 F.Supp at 1296; *George Simon, Inc.*, 492 F. Supp. at 838; *Boz Scaggs Music*, 491 F. Supp. at 914. The evidence establishes that Defendant’s actions were entirely deliberate and not the result of an innocent mistake. Defendant agreed in 1986 to convey to Plaintiff all rights of publication to *The Awkward Silence* that he possessed, in any capacity, and agreed not to represent himself, in any capacity, as being the publisher; however, in 1997 he, in his capacity as president of The Conservatory of American Letters, granted to another the rights to reprint Plaintiff’s work. Defendant’s action granting another the right to reprint Plaintiff’s poem, clearly evidences a deliberate disregard of the property rights of Plaintiff, as well as copyright law and the 1986 settlement agreement. Defendant’s perseverance and manipulative attitude toward his violation of copyright law further evidences his blameworthiness. Such misconduct necessitates an award of statutory damages above the statutory minimum and reflective of the degree of fault, but moderated by the fact that the economic aspect of this case is insignificant. Accordingly, the Court will award Plaintiff \$5,000 in statutory damages.

### **B. Attorneys’ Fees and Costs**

Plaintiff also seeks counsel fees and costs of \$10,941.89. Defendant responds that Plaintiff

---

<sup>1</sup> The Court did not squarely address this argument when ruling on Plaintiff’s Motion for Summary Judgment because the November 1982 document purporting to transfer the rights to reprint *The Awkward Silence* from Northwoods Press, Inc. to The Conservatory of American Letters was not properly before the Court. Moreover, the Court made no determination with respect to The Conservatory of American Letters because it was not a party to the lawsuit. Defendant’s argument is significant now

should not have initiated this lawsuit if he could not afford to pay for it. An award of attorneys' fees and costs is authorized under 17 U.S.C. § 505 for copyright infringement. The purpose of awarding fees and costs is not to punish Defendant; rather they are awarded to permit and encourage Plaintiff to assert his rights under the copyright laws. The Court finds that it is proper to award them in this case.

The Court notes that this is the second time Plaintiff has had to initiate suit against Defendant in order to prevent Defendant's wrongful conduct. Plaintiff's counsel, Robert E. Sandy, Jr., has submitted an affidavit summarizing the fees and costs totaling \$10,941.89. *See* Plaintiff's Ex. 3, Affidavit of Robert E. Sandy dated May 25, 2000, and Affidavit of Robert E. Sandy dated June 13, 2000 (Docket No. 32). The Court has reviewed the billing records submitted to it and finds that Plaintiff should be compensated \$8,681, representing a reasonable fee, and \$427.43 in costs.<sup>2</sup>

Attorney Sandy charged \$150 per hour for his time and \$110 per hour for the time of his associate attorney, J. Daniel Hoffman. The Court finds that these rates reflect the customary hourly rates charged by Maine attorneys with similar experience in civil litigation and are, thus, reasonable rates. In total, attorney Sandy spent 62.9 hours and attorney Hoffman spent 3.9 hours working on this case, which includes time spent on a successful summary judgment motion, a damages hearing, and responses to two motions to reconsider. The Court finds that the total number of hours spent on this case was reasonable for a case of this type involving federal copyright law. However, included in the time was approximately 9.1 hours of travel time for attorney Sandy at his hourly rate of \$150. The Court will reduce the allowable travel time charge to \$20 per hour – a reasonable rate for this time absent some showing that the attorney was

---

because it bears on the issues of his intent and the threat of further infringement by Defendant.

<sup>2</sup> The award of costs represents the full amount requested by Plaintiff for costs.

working while traveling. *Auburn Police Union v. Tierney*, 762 F. Supp. 3, 4 (D. Me. 1991). The Court will, therefore, allow \$8,252 for Attorney Sandy's time and \$429 for Attorney Hoffman's time. The bill also includes 8.5 hours of paralegal charges at \$50 per hour. Charges for paralegal time is properly included in overhead, thus the Court will not allow \$425 in paralegal charges. *Id.* at 5. The total fee awarded is \$8,681.

## **II. Injunctive Relief**

Section 502(a) of the Copyright Act authorizes a court to issue a permanent injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). A showing of past copyright infringement and a substantial likelihood of future infringement entitles a copyright owner to a permanent injunction under § 502. *Harolds Stores, Inc. v. Dillard Department Stores, Inc.*, 82 F.3d 1533, 1555 (10<sup>th</sup> Cir.) (absent "probability or threat of continuing infringements, injunctive relief is ordinarily inappropriate"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567-68 (D.C. Cir. 1990); *Pacific and Southern Co., Inc. v. Duncan*, 744 F.2d 1490, 1499 (11<sup>th</sup> Cir. 1984); *Melene*, 551 F. Supp. at 1295.

The Court determined on summary judgment that Defendant is personally liable for his role in the infringement of Ehrhart's copyright in *The Awkward Silence*. Despite this determination, at the evidentiary damages hearing, Defendant was steadfast in his position that he has done nothing wrong.<sup>3</sup> In addition, the evidence demonstrates that Defendant is recalcitrant about ceasing use of Plaintiff's work and that he is still actively involved in the publishing business and "volunteers" at The Conservatory of American Letters. Defendant's deliberate disregard of Plaintiff's rights, his recalcitrant position, and the fact that he remains involved with publishing at The Conservatory of

---

<sup>3</sup> The Court notes, however, that Defendant has retreated somewhat from his position at the damages hearing, asserting that he "does accept the fact that he infringed, [but] [t]he fact that he does not yet understand exactly how does not change his acceptance of the fact." Defendant's Post-Trial Brief at 9.

American Letters necessitates the finding that a substantial likelihood of further infringement exists. The Court will, therefore, order that Defendant be permanently enjoined from any use of the original works of Plaintiff William D. Ehrhart contained in *The Awkward Silence*, including the poem “Guerilla War,” and from directing, granting, or permitting others to use, print, or reprint the original works contained in *The Awkward Silence*, including the poem “Guerilla War.”<sup>4</sup>

Accordingly, it is hereby **ORDERED** that Judgment be entered against Defendant Robert Olmsted for Five Thousand Dollars (\$5,000) in statutory damages, Eight Thousand Six Hundred Eighty-One Dollars (\$8,681) in attorneys’ fees, and Four Hundred Twenty-Seven Dollars and Forty-Three Cents (\$427.43) in costs. It is **FURTHER ORDERED** that Defendant Robert Olmsted individually, or acting in any other capacity, be **PERMANENTLY ENJOINED** and **RESTRAINED** from any use of the original works of Plaintiff William D. Ehrhart contained in *The Awkward Silence*, including the poem “Guerilla War,” and from directing, granting, or

---

<sup>4</sup> Although this suit was brought for only one act of infringement, the evidence revealed Defendant’s participation in two other acts of infringement that were time barred when this suit was brought.

permitting others to use, print, or reprint the original works contained in *The Awkward Silence*,  
including the poem “Guerilla War.”

---

GENE CARTER  
District Judge

Dated at Portland, Maine this 6<sup>th</sup> day of November, 2000.

WILLIAM D EHRHART  
    plaintiff

ROBERT E. SANDY, ESQ.  
[COR LD NTC]  
SHERMAN & SANDY  
P.O. BOX 499  
WATERVILLE, ME 04903-0499  
872-7727

v.

ROBERT OLMSTED  
dba  
CONSERVATORY OF AMERICAN  
LETTERS  
    defendant

ROBERT OLMSTED  
[COR LD NTC] [PRO SE]  
P.O. Box 298  
Thomaston, ME 04851